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Nos. 88-192; 88-325

In The

Supreme Court of the United States

October Term, 1989

McKESSON CORPORATION,

Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,

Respondents.

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Petitioners,

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, et al.,

Respondents.

On Writ of Certiorari to the Supreme Courts of the States of Florida and Arkansas

BRIEF AMICUS CURIAE OF THE CROW TRIBE OF INDIANS IN SUPPORT OF PETITIONERS

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CONSENT TO FILING

Petitioners and Respondents in these consolidated cases have consented to the filing of this *Amicus Curiae* brief. Letters from counsel for all parties granting consent have been separately filed with the Clerk of this Court pursuant to Rule 36.2.

INTEREST OF THE CROW TRIBE OF INDIANS

The Crow Tribe of Indians is a federally recognized Indian Tribe with approximately 8000 members and a reservation of 2.3 million acres located entirely within the State of Montana. Beginning in 1975, the State of Montana adopted and enforced the nation's highest coal severance taxes and collected more than $53,000,000 from the Tribe's lessee between the years 1975 and 1983.

In 1988, this Court summarily affirmed a decision of the Ninth Circuit Court of Appeals holding Montana's coal severance taxes void on the grounds that they were pre-empted by federal law and policies and that the state taxes interfered with Tribal self-government. *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd* 484 U.S. 997 (1988). Still to be determined in that case is the refund and disposition of taxes paid by the Tribe's lessee between 1976 and 1983, together with interest thereon.[1]

[1] Westmoreland Resources, Inc., the Tribe's lessee actually paid Montana's taxes. The Crow Tribe, in 1976, adopted a tribal severance tax applicable to Westmoreland. The Tribe and Westmoreland have agreed that Westmoreland will receive a tribal tax credit for any taxes that it is required to pay Montana.

The Crow Tribe appears as *amicus curiae* to call attention to the possibility that a decision in these consolidated Commerce Clause cases could affect federally protected Indian rights in two ways. First, a ruling that Florida or Arkansas may retain taxes collected in violation of the Federal Constitution could make it difficult or impossible for the Crow Tribe to retrieve the enormous coal severance taxes collected by Montana. Secondly, the Crow Tribe wishes to voice its concern that nothing in the Court's disposition of these cases foreclose the Tribe's presumptive entitlement to interest in conjunction with its tax refund.[2]

SUMMARY OF ARGUMENT

Indians of necessity have sought the protection of federal law against the actions of states frequently hostile to them and contemptuous of their rights. Protection from invalid state taxes can be of transcendent importance to a Tribal government when, as in the case of the Crow Tribe, those invalid taxes appropriate the mineral wealth of the Tribe. To be meaningful, federal protection must require in every case the refund of illegally exacted state taxes.

[2] Montana, through its investment of severance tax money, has earned tens of millions of dollars in interest on monies paid by Westmoreland to Montana on account of the state's void tax. The Crow Tribal tax has been ruled valid, and it now appears that Westmoreland's tax payments should have been paid to the Crow Tribe rather than Montana.

This Court, for sound reasons, has consistently required states to refund taxes collected in contravention of federal law. Nonretroactivity, if applied in the cases before the Court, would eliminate this historic requirement. To sanction retention by a state government of funds exacted in violation of federal law stands the Supremacy Clause on its head.

To permit a state to retain monies unlawfully collected by the compulsive process of state tax law not only offends fundamental notions of fair play but such a result will also encourage state legislatures to act in defiance of federally protected rights as so plainly occurred in the Florida case before the Court and in the Montana case involving the Crow Tribe. Public policy demands that this Court reaffirm a rule which will deter rather than promote the parochialism of state legislators.

In tax refund cases, due to the passage of time, the award of interest can be of greater consequence than the tax refund itself. For example, Montana's void taxes were assessed against the Crow Tribe's lessee in 1975, and the Tribe's claim reaches back to that time. The Tribe's claim for interest is more than double the claim for taxes.

The time has come to announce a rule that prejudgment interest should be presumptively available to victims of federal law violations. Without it, compensation of the plaintiff is incomplete and the defendant has an incentive to delay. The Court has properly recognized that the traditional view, which treated prejudgment interest as a penalty awarded on the basis of the defendant's conduct, has long been criticized on the ground that prejudgment interest represents "delay damages"

and should be awarded as a component of full compensation.

This case may not provide the appropriate occasion to address the issue of prejudgment interest. Nevertheless, the Crow Tribe requests that the Court be mindful of the important role which interest can play in providing full compensation to an aggrieved taxpayer.

ARGUMENT

I. DECISIONS INVALIDATING STATE TAX STATUTES ON FEDERAL GROUNDS SHOULD ALWAYS BE APPLIED RETROACTIVELY.

This Court has repeatedly ruled that the Constitution mandates a refund of state taxes collected under laws which violate federal law or the Constitution itself. *E.g.*, *Ward v. Love County*, 253 U.S. 17 (1920); *Carpenter v. Shaw*, 280 U.S. 363 (1930). It is not surprising that both cases involved Indians who sought protection in the federal courts.

Historically Indians have been particularly vulnerable to improper state actions, including the collection of state taxes. Lacking economic or political power, they must rely on federal protection. Over a century ago, this Court made the following observation:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from

> them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.

United States v. Kagama, 118 U.S. 375, 383-84 (1886) (Emphases in original).

In *Ward v. Love County*, 253 U.S. 17 (1920), this Court held that the Due Process Clause of the Fourteenth Amendment required Love County, Oklahoma to refund taxes to an Indian allottee. Said the Court:

> . . . if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. [citations omitted]. To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these [taxpayers] arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment. . . .

Id. at 24.

Ten years later in *Carpenter v. Shaw*, 280 U.S. 363 (1930), the Court made it clear that a state will not be allowed to vitiate federally protected rights. Thus a state could not, on state law grounds, seek to avoid the mandate of federal law.

> Where a Federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislature, or relieved by it from considering the real nature of the tax and its effect upon the federal right asserted.

Carpenter v. Shaw, supra, at 367-68. The Court reaffirmed the holding of *Ward v. Love County, supra*, "that a denial

by a state court of a recovery of taxes enacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the 14th Amendment." *Id.* at 369. *See, also, Montana Nat'l Bank of Billings v. Yellowstone County, Montana*, 276 U.S. 499, 504, 505 (1928) (unlawfully exacted funds cannot remain in public treasury); *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931) (refund taxpayer's federal remedy); *Maryland v. Louisiana*, 451 U.S. 456, 457 (1981) (refund together with interest).

The above-cited cases reflect this Court's recognition of the result required by fundamental notions of fair play. Any other result would be plainly inconsistent with the Supremacy Clause, because it would subordinate constitutionally mandated rights to state interests.

In cases involving state taxation, moreover, there is no occasion to consider the narrow exception to the rule of retroactivity which applies where an unanticipated new rule could cause injustice to innocent parties by, for example, voiding marriages, making municipal bonds worthless, or retroactively changing limitation periods. *See, Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Taxation differs from the cases governed by the *Chevron* rule because it concerns money rather than legal status or rights. While in some instances a state may not anticipate that its tax law will be ruled unconstitutional, it will *never* be constitutionally acceptable to deprive a taxpayer of a refund on this account. The monies paid to the state are "property" within the meaning of the Fourteenth Amendment, and the state's permanent deprivation of a refund or other retrospective relief for a tax collected in violation

of federal law constitutes a forbidden taking. *Ward v. Love County, supra.*

Nor is it appropriate to reward states which violate federally protected rights. State legislators are elected to represent the popular, majoritarian interests of their districts. The behavior reflected by Florida's legislators in revising the revised products exemption without any serious regard to constitutional limitations, *see*, McKesson Corporation's Brief at 15-16, is similar to the Montana legislature's actions in deliberately disregarding the federally protected rights of the Crow Tribe with respect to the coal severance tax. If Florida, Montana, or Arkansas is permitted to retain any portion of its illegal tax revenue, then their disregard for federally protected rights will be inappropriately rewarded.

A very different result is required in order to foster concern for federally protected rights – particularly the rights of minorities. For this reason, the states in every instance should be required to refund all tax revenue collected in violation of federal law together with interest. *See, Maryland v. Louisiana*, 452 U.S. 456, 457 (1981).

II. ALL TAX REFUNDS MUST INCLUDE INTEREST.

In tax refund cases, due to the passage of time, the award of interest can be of greater consequence than the tax refund itself. For example, Montana's void taxes were assessed against the Crow Tribe's lessee in 1975, and the Tribe's claim reaches back to that time. The Tribe's claim for interest is more than double the claim for taxes.

The time has come to announce a rule that prejudgment interest should be presumptively available to victims of federal law violations. Without it, compensation of the plaintiff is incomplete and the defendant has an incentive to delay. *See, Waite v. United States*, 282 U.S. 508, 509 (1931) (interest from time of the taking necessary to constitute adequate compensation under the Fifth Amendment); *Miller v. Robertson*, 266 U.S. 243, 258 (1924) (prejudgment interest required for "full compensation").

The Court has properly recognized that the traditional view, which treated prejudgment interest as a penalty awarded on the basis of the defendant's conduct, has long been criticized on the ground that prejudgment interest represents "delay damages" and should be awarded as a component of full compensation. *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655 n. 10 (1983). An award of interest, moreover, is governed by federal, not state law. *See, West Virginia v. United States*, 479 U.S. 305, 308-09 (1987). Thus a state's failure to allow interest in state tax refund cases cannot preclude an award of interest where the refund is based on a deprivation of federal rights. *Cf., Board of County Commissioners v. United States*, 308 U.S. 343, 350 (1943).

This case may not provide the appropriate occasion to address the issue of prejudgment interest. Nevertheless, the Crow Tribe requests that the Court be mindful of the important role which interest can play in providing full compensation to an aggrieved taxpayer.

CONCLUSION

For the reasons stated above, this Court should reverse the judgments below with respect to the judgment of prospectivity and rule in favor of Petitioners.

Respectfully submitted,

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